IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1088 OF 2002

The New India Assurance Company Ltd. ...Appellant
Vs.
Baldevraj S. Sharma
Sanjeev Gupte ...Respondents

Mr.M.G.Barve for the Appellant
Mr.S.M.Oak for the Respondent No.1.

CORAM: A.S.OKA, J.
DATED: JULY 19,2006.

ORAL JUDGMENT:

1. Heard Shri Barve for the Appellant. The challenge in this Appeal is to the Judgment and Award dated 4th May 2002 passed by the learned Commissioner for Workmen's Compensation, Thane in a claim made by the first Respondent.

2. The case of the first Respondent is that he was employed by the second Respondent as a driver of motor truck bearing registration No.MH-06-9498. According to the case of the first Respondent, on 19th June 1998 when he was driving the said truck during the course of his employment, it met with an accident. In the said accident, the first Respondent sustained fracture of left leg and multiple injuries as well as internal injuries. According to the case of the first Respondent, he was drawing a salary of Rs.3000/- per month.

3. The second Respondent did not contest the application. However, the Appellant contested the claim petition by denying that the first Respondent was in the employment of the second Respondent and that the first Respondent sustained

injuries. By impugned Judgment and Award a sum of Rs.2,21,640/- has been awarded by way of compensation in favour of the first Respondent. The Appellant was directed to pay interest at the rate of 12% per annum on the said amount from 20th January 2001. On the said date, the Appellant filed written statement. The learned Commissioner for Workmen's Compensation directed the second Respondent-employer to pay penalty equivalent to 50% of the compensation amount.

4. Shri Barve appearing for the Appellant submitted that the impugned Judgment and Award is perverse. He pointed out that though the accident occurred on 19th June 1998, the Medical Practitioner who was examined as a witness by the first Respondent before the Commissioner had examined the first Respondent on 22nd January 2002. He submitted that partial permanent disability of the first Respondent assessed at 57% was not supported by any manual. He submitted that there was no case made out for coming to the conclusion that there was 100% loss of earning capacity. He submitted that there was no evidence on record as regards the exact age of the first Respondent. He submitted that there was no reason to award interest against the Appellant. He submitted that even assuming that the first Respondent was a driver employed by the second Respondent, the order for payment of interest ought to have been passed against the second Respondent. He submitted that the entire burden on proving the claim

including income was on the first Respondent and he has failed to discharge the said burden.

5. I have considered the submissions made by Shri Barve. The first Respondent examined himself before the learned Commissioner. He stated that after the accident he was admitted in Government Hospital at Dhule for about two days and the second Respondent transferred him to Navi Mumbai Municipal Hospital. He stated that he was hospitalised for about 3 months and 3 days and a surgery was carried out on his left leg and left arm by inserting certain metal. He stated that he was unable to drive any sort of vehicle. He was unable to walk and was unable to do any other work. He produced various documents along with Exh.12. In the examination-in-chief of the first Respondent, the learned Commissioner has noted that the present Appellant had admitted the documents at serial Nos.1, 2, 3, 7 and 8 in the said list which are marked as Exh.14 to 18 respectively. The first Respondent proved his salary certificate marked as Exh.19. The cross examination of the first Respondent made by the Advocate for the Appellant runs only into only six lines. There is no challenge in the cross examination to the factum of the accident and to the injuries sustained by the first Respondent. There is no cross examination on the income certificate at exh.19. The cross examination of the Respondent No.1 made by the Advocate for the Appellant reads thus :

". I have not filed documents from Dhule Hospital. I have not filed documentary evidence to show my age. It is not correct to state that I am deposing falsely that I am unable to drive the vehicle. It is not correct to state that I am deposing false complaint.

6. It will be necessary to see which were the documents admitted by the Appellant. The first document at Exh.14 which is the F.I.R. lodged by one Asif J. Khana who was the cleaner of the truck. The document at Exh.15 is the spot panchnama. The document at Exh.16 is the follow up card which was issued by Navi Mumbai Municipal Hospital. As pointed out earlier, the first Respondent deposed before the Commissioner that two days after the accident, he was shifted to the said Municipal hospital at Navi Mumbai. The said follow up card records that the first Respondent was admitted to the said hospital on 22nd June 1998 and was discharged on 28th September 1998. The said card records the diagnosis and the treatment given to the first Respondent. Thus, there cannot be any dispute about the factum of accident and the fact that the accident occurred during the course of employment of the first Respondent. The follow up card which is admitted in the evidence at Exh.16 clearly establishes the case of the first Respondent of his admission to the hospital on 22nd June 1998 and the injuries sustained by him. It is true that any Doctor working in the said hospital has not

been examined. However, Dr.Ajit Mahadeo Natu has been examined. The said Medical Practitioner stated that he examined the first Respondent on 22nd June 2002 after radiological examination of the first Respondent made by Dr.V.P.Atmaram. He stated in the examination-in-chief as under :

. "On examination Mr.Baldev Shandardas Sharma was found to be suffering from fracture of left forearm and fracture of left T.B.I. and fibula. He has bony ankylosis of the left knee joint. He has recidual in action with badly smelling sinuous and dead bone in his lower femur and upper T.B.I. He still has metallic implants inserted in his body. "Bony ankylosis in the left knee joint" it means knee joint was totally stiff and there was no movements.

. The partial permanent disability of the applicant is 57%. It has been assessed on following grounds :

a. Ankylosis of left knee joint 40%
b. Muscle wasting 2%
c. Extensive skin scarring 2%
d. Shortening of left lower limb 10%
e. Residual infection with desharging sinuous 3%

. Thus total partition disability is 57%. The above disability has been worked out by me as per the Manual for orthopedic Surgeons in Evaluating Permanent Physical impairment.

. **With the abovesaid disability, the applicant cannot perform the manual work. The patient applicant is unable to drive any sort of vehicle. The occupational disability of the applicant as a driver is 100%."**

(Emphasis supplied)

6. There is a very limited cross examination of the Medical Practitioner made by the Advocate for the Appellant. The said cross examination is made after the follow up card produced by the first Respondent was admitted in the evidence. No suggestion has been given to the Medical Practitioner that the injuries which he has noted in the evidence have no relation to the injuries sustained by the first Respondent which are reflected from the follow up card. The follow up card also gives details of the surgery performed. Dr.Natu has referred to the consequence of the injuries sustained by the first Respondent in the accident. There is no serious challenge to the observations made by Dr.Natu regarding 100% occupational disability. In the cross examination on this aspect, Dr.Natu stated that is that there is no manual for occupational disability and what is stated

is his opinion.

7. Shri Barve relied upon the Judgment of the Apex Court reported in Amar Nath Singh Vs. Continental Constructions Ltd. reported in 2001 ACJ page 643 and submitted that 57% disability of the left leg cannot be assessed as 100%. A reference will have to be made to paragraph 4 of the said decision which reads thus :

"4. Having gone through the papers and having heard learned counsel on both the sides, we are of the opinion that we should not be unduly fettered by the principles stated either in the Act or made in the course of the proceedings in this case and on overall assessment of the matter, we think that out of Rs.1,97,000/- deposited in the High Court towards compensation and penalty, which has been withdrawn by the appellant, a sum of Rs.1,00,000/- shall be retained by the appellant while a balance of Rs.97,000/- shall be refunded to the respondent in six months from today. It is open to the appellant to pay that amount of Rs.97,000/- in different instalments if he so chooses. The appeal is disposed of accordingly modifying the order made by the Commissioner, Workmen’s Compensation and that of the High Court."

It is therefore obvious that in the peculiar facts of the case the Apex Court has passed the said order. The second decision which is relied upon by Shri Barve is in case of Oriental Insurance Co.Ltd. Vs. Raju and another (1998 ACJ page 1025). The said matter arose out the Appeal preferred against an order made for compensation at 100% disablement on the ground that disability suffered by the claimant disqualified him from performing job of a driver. The learned Judge of the Karnataka High Court held that there could not be 100% disability as he could earn by performing some other functions which would yield lower income. It was held that the injured could have done some other work and earn livelihood. In paragraph 2 of the said decision the learned Single Judge of Karnataka High Court held thus :

"2....The appellant's learned advocate submitted that if the disability is to be construed at 100 percent, it should virtually mean that the person's source of livelihood would be reduced to zero. In the present situation he submitted that even if the applicant could not work as a driver, he could perhaps earn by performing some other functions which undoubtedly would yield a lower income but would still not disqualify him from doing any work whatsoever. This is an aspect of the matter which undoubtedly requires consideration but the real difficulty in the way of the appellant's learned advocate arises

from the fact that there was absolutely no contest to the case in the lower court. The evidence of the applicant has been allowed to go uncontroverted on these points as a result of which it would now not be permissible at the appellate stage to try and water down that evidence.

8. Coming back to the present case in his examination-in-chief the first Respondent has clearly deposed that he was unable to walk properly and he was unable to drive any sort of vehicle. He stated that he was unable to do any other work. There is hardly any cross examination on this aspect. Considering the evidence of the first Respondent, the evidence in the form of follow up card at Exh.16 and the evidence of Dr.Natu, the learned Commissioner for Workmen's Compensation has accepted the case made out by the first Respondent that there is 100% occupational disability. Appreciation of evidence by the Trial Court cannot be said to be perverse and it is difficult to find fault with the said finding.

9. As stated earlier income certificate of the first Respondent is proved in his evidence and there is no challenge to the same in the cross examination. That is how the quantum of compensation has been fixed by the Commissioner by applying the formula under the Act.

10. So far as interest is concerned, reliance is placed on

decision of a learned Single Judge of this court in case of Divisional Manager, United India Insurance Co. Ltd. vs. Subhash Bahadur and another (1996 ACJ 558). Perusal of paragraph No.3 of the said decision shows that the learned Single Judge held that Insurance Company was not liable to pay interest considering the factual aspects of the said case. In the present case, the learned Commissioner has observed that the written statement was filed by the Appellant on 20th January 2001. Written statement is of complete denial. The learned Commissioner has observed that on the basis of the claim of the first Respondent, Appellant ought to have made assessment and ought to have offered to deposit the amount as per the calculation made by the Appellant. However, no such stand was taken by the Appellant. As pointed out earlier, various documents produced by the first Respondent were admitted by the Appellant. There was no reason to take a stand of complete denial. That is the reason why the Appellant was directed to pay interest not from the date of accident or from the date of filing claim but from the date of filing the written statement. No fault can be found with the approach of the learned Commissioner. So far as penalty is concerned, there is no direction against the Appellant and the direction is confined to the second Respondent.

11. There is no merit in the Appeal and the same is dismissed with no order as to costs.

12. At this stage, Shri Barve for the Appellant prays that operation of the Judgment may be stayed for a reasonable time. Said prayer is opposed by the first Respondent.

13. Considering the facts and circumstances of the case, operation of the Judgment is stayed for a period of twelve weeks from today. Shri Barve prays for leave to prefer Appeal in the Apex Court. Leave is refused.

Judge.